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No. 75

# In the Supreme Court of the United States

OCTOBER TERM, 1961

CARLIN CONSTANTINE VENUS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinions in the court of appeals (R. 246–259) are reported at 287 F. 2d 304.

### JURISDICTION

The judgment of the court of appeals was entered on December 24, 1960 (R. 259–260), and a petition for rehearing was denied on February 2, 1961 (R. 260). On February 23, 1961, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to April 3, 1961 (R. 261). The petition was filed on April 1, 1961, and granted on May 15, 1961 (R. 261; 366 U.S. 922). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the court of appeals properly affirmed petitioner's conviction of having knowingly failed to keep his local draft board advised of an address where mail could reach him in February 1955.[1]

## STATUTE AND REGULATION INVOLVED

Section 12(a) of the Universal Military Training and Service Act, 50 U.S.C. App. 462(a), provides in pertinent part:

> Any * * * person charged as herein provided with the duty of carrying out any of the provisions of this title * * * or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Selective Service Regulation 1641.3, 32 C.F.R. 1641.3, provides:

> *Communication by mail.* It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a

[1] Petitioner neither tenders as a question presented (see Pet. Br. 2) nor argues (Pet. Br. 13–38), as he did in his petition for a writ of certiorari (Pet. 18–20), that he was denied a speedy trial. Since petitioner has abandoned this claim, we do not deal with it in this brief. Cf. *Ladner* v. *United States*, 358 U.S. 169, 172–173.

registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not.

## STATEMENT

On August 8, 1957, an indictment was returned in the United States District Court for the Southern District of California charging that petitioner knowingly failed to report for induction into the armed forces of the United States on November 8, 1955 (R. 1–2). Petitioner was convicted by a jury on this charge but his conviction was reversed on appeal because of inadequate and improper instructions. *Venus* v. *United States*, 266 F. 2d 386 (C.A. 9).[2]

On December 23, 1959, a two-count indictment was returned in the same district court charging that petitioner knowingly failed to perform a continuing duty to report for induction on or about April 9, 1956 (count one), and that he knowingly failed on or about February 1, 1955, to keep his local draft board advised of the address where mail would reach him (count two) (R. 2–4). On May 14, 1960, after a jury trial on both indictments, petitioner was convicted on count two of the second indictment (R. 200–201).[3] He was sentenced to three years' imprisonment and to pay a $500 fine (R. 40, 207).

[2] Petitioner was thereafter tried again on this indictment in August 1959, and December 1959 (see R. 98–99), but a mistrial resulted on each occasion because the jury was unable to agree upon a verdict (R. 247).

[3] The jury was unable to agree on a verdict as to the other charges (the first indictment, and count one of the second indictment), and these charges were dismissed by the trial court (R. 204).

## I. THE EVIDENCE [4]

### A. BACKGROUND

Petitioner registered for the draft on September 15, 1948, and in July 1950 he was classified 1–A by his Local Draft Board No. 140, San Diego, California (R. 124; *Cover Sheet* at R. 211, 213, 215; *Notice of Classification* at R. 228).[5] That same year, he married and received a dependency deferment (draft classification 3–A) (R. 124, 134–135; *Cover Sheet,* at R. 211, 213, 214; *Classification Questionnaire,* at R. 224, line 3). In November 1951, he was reclassified 1–A following his divorce (R. 125; *Classification Questionnaire* at R. 224, line 5). Shortly thereafter, petitioner filed a "Conscientious Objector Form" (R. 125), and, on January 9, 1952, he was classified 1–A–O—*i.e.,* available for noncombatant military service (*Cover Sheet* at R. 211, 213, 215; *Classification Questionnaire* at R. 224, line 10). Following this, he obtained employment with several shipbuilding concerns and, as a result, received an occupational deferment (2–A) on February 27, 1952, which was renewed on October 15, 1952 (R. 126; *Classification Questionnaire* at R. 224, lines 15 and 20). In January 1953, he was reclassified 1–A which classification was affirmed by the appeal board in April 1954

[4] Many of the exhibits introduced at the trial (primarily petitioner's selective service file) have been printed as part of the record and are referred to herein by their descriptive title followed by a record page number.

[5] Apparently petitioner could not be located at the address to which this Notice of Classification was sent (R. 227; see R. 124), but on August 8, 1950, petitioner reported his new address (see *Cover Sheet*, R. 211, 213, 215; line 1).

(*Classification Questionnaire* at R. 224, line 23). He was ordered to report for induction in May 1954. He reported as ordered but refused to submit to induction (R. 126–127; *Individual Appeal Record* at R. 229; *Order to Report for Induction* at R. 230–231). In August 1954, the local board reported petitioner's failure to submit to induction to the United States Attorney and, on October 20, 1954, he was indicted for this offense. In July 1955, following this Court's decision in *Gonzales* v. *United States*, 348 U.S. 407, the indictment was dismissed. On September 1, 1955, petitioner's 1–A classification was continued by the board (R. 62; *Classification Questionnaire* at R. 225, line 14).

B. THE FACTS OF THE OFFENSE

1. From August 1950 up until June 1954, petitioner notified his local draft board on five separate occasions of addresses where mail would reach him—three of which were in San Diego.[6] Petitioner testified at the trial that he "always knew" that he had to keep his local board informed of his address (R. 100, 133), and the Classification Questionnaire which he filed in May 1949 contained an instruction that he

[6] In his Classification Questionnaire filed on May 16, 1949, petitioner had listed his address in Chula Vista, California (see R. 103, 124, 217). On August 8, 1950, he reported a change of address to National City, California. The first of his San Diego addresses was given the local board in September 1951, and was his "personal address" where he resided with his first wife (R. 128). The other two addresses given prior to June 1954 were the residences of his parents in San Diego (R. 128–129; *Cover Sheet* at R. 211, 213, 215).

report to his draft board any change of address "at once" (*Instruction No. 5* at R. 217).

On June 7, 1954, petitioner wrote the following registered letter (R. 132) to his local board (R. 67):

> At this time I wish to inform you of my departure from San Diego to Modesto, California, because of secular employment. The Federal Bureau of Investigation I have notified when in Los Angeles after induction procedures. My new address is (Same employer) 1431 Tenth Street, Modesto, California, but can be reached within one or two days, at my San Diego address.

The return address on the envelope was "650 Eleventh Street, San Diego", which was then the address of petitioner's parents (R. 67–68, 129), and the most recent previous address given by him to the local board (see *Cover Sheet* at R. 211, 213, 215, line 5). At that time, the clerk of the local board made a notation in the file indicating to her that if any mail were returned to the board from the Modesto address she "would look for or try and contact [petitioner] through his San Diego address"; she knew that he had always given his parents as the persons through whom he could be reached (R. 67–68). However, in the course of time, in keeping up the file, the clerk omitted the notation referring to this San Diego address (R. 66).

2. In the early part of February 1955, petitioner moved from Modesto to Los Angeles (R. 106, 121–122, 130, 140–144). He left no forwarding address with the post office in Modesto (R. 101, 112, 130–131). He explained his failure to leave a forwarding ad-

dress on the ground that everybody knew the San Diego address of his parents and he knew that his local board had that address (650 Eleventh Street) (R. 130–131; see also R. 112).[7]

On the weekend of February 19–20, petitioner came down from Los Angeles to help his parents move from 11th Street to 30th Street in San Diego (R. 109, 122, 144, 155–156). He testified that, a few days thereafter, on his return to Los Angeles, he addressed and mailed a post card to his local board giving notice that he was no longer living in Modesto and that mail could reach him at the 30th Street address of his parents (R. 106–110, 112, 122, 131–132). He further stated that he put his parents' new address on the post card (R. 109). Edwin Beil, a witness for petitioner, testified that he was with petitioner in a Los Angeles Post Office a few days after petitioner's return from San Diego in February 1955 and saw him mail a post card. Mr. Beil was unable to read the writing on the card. He said that petitioner told him that it was a change-of-address notification (R. 145–146).

Mrs. Helen A. Haisch, a clerk at petitioner's local board, who had "complete charge of all the files" and whose responsibility it was "to open and stamp all of the incoming mail" (R. 49), stated that no such change of address notification was received from

[7] However, in January 1955, shortly before he left Modesto, petitioner had the State Director of Selective Service mail a photostatic copy of his draft board file to a friend's address in Modesto who then forwarded it to his parents' home in San Diego (R. 135–137).

petitioner and that, as a matter of fact, petitioner did not correspond with the board from June 1954 through the end of 1955 (R. 54–55). Mrs. Haisch testified that, pursuant to a suggestion from the United States Attorney's office, she and another clerk at the local board searched through all the files (some 2,000) of those registrants born in 1929 and 1930 (R. 90)—in an effort to see if the post card had been misfiled. (Petitioner was born in December 1929. (*Classification Questionnaire* at R. 217)). In addition, they searched through 1,000 other files according to draft classification (R. 90). No post card from petitioner was located in the search. Mrs. Haisch further testified that, although petitioner's original file was at the California State Selective Service Headquarters from November 1954 until July 1955, a "duplicate" or "dummy" cover sheet was made for petitioner and placed where the original file would ordinarily be, and this would contain all correspondence to or from petitioner while his regular file was out of the office (R. 77–79, 82–83; cf. 32 C.F.R. 1621.8).

3. From the latter part of February 1955 through December 1955, petitioner testified, he resided at some five separate locations. From February through the middle of April 1955, he lived in Los Angeles; he then moved to Venice, California, for a month; he then returned to Los Angeles and stayed at the Del Mar Hotel for about a week; he then resided for a month at 513 Grand Street; and during the last half of 1955 he resided at 2006 Stawns Drive, Los Angeles (R. 132–133). He did not inform

the local board of any of these addresses (R. 132–138; see also R. 111). Petitioner's first undisputed communication to his local board, after his June 1954 letter (*supra*, p. 6), came in early April 1956 when he advised the board of a "new address" at 756 Pier Avenue, Santa Monica, California (R. 95–96, 116).[5]

4. In September 1955, the local board sent a 1–A classification to petitioner at the Modesto address he had given the board in his June 1954 letter, and on October 28, 1955, the board sent a notice to this address ordering petitioner to report for induction on November 8, 1955 (R. 52–59). Both of these notices contained the return address of the local board. Neither one was ever returned to the board (R. 59). Mrs. Haisch explained that the Board did not attempt to locate petitioner at any other address after his failure to report for induction on November 8, 1955, because the order to report "was not returned to us. Therefore we assumed [petitioner] received it, so we did not contact anyone else or try to contact anyone else" (R. 73, see also R. 67, 69, 74).

Petitioner testified that he received neither notice (R. 110–111); and that the first time he was aware of the induction order was in April 1956, following his interview with an F.B.I. agent (R. 112, 113, 116). It was after this interview that he contacted the draft board, for the first time since June 1954, and advised them of his then current address (see *supra*).

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[5] This communication came shortly after petitioner's interview with an F.B.I. agent concerning his failure to report for induction in November 1955 (R. 113, 116).

II. THE INSTRUCTIONS OF THE TRIAL COURT

After charging the jury, *inter alia,* on the presumption of innocence (R. 170), and the burden on the government to prove guilt beyond a reasonable doubt (R. 171), the court continued (R. 176):

> You are instructed that a Registrant is not required to remain in one place or to notify the Local Board of every address even if the address is temporary. The Regulation is satisfied when the Registrant, in good faith, provides an address by which mail sent to that address furnished to the Board may be by the Registrant reasonably expected to come into his hands in time for compliance.

The court thereafter instructed that the question of petitioner's guilt or innocence on count two of the second indictment basically depended on whether, as petitioner claimed, he mailed a change of address notice to the local board in February 1955. If the jury believed, the court said, "that the defendant deposited in the United States Mail in Los Angeles in February, 1955 a card notifying the Local Board of the change of address, then whether or not the card was received by the Local Board, the defendant should be acquitted * * *" (R. 184, see also R. 185, 188–189, 190).

Defense counsel, although recognizing that this instruction was "perfectly proper" (R. 194), asked the court further to instruct the jury that they might acquit the defendant even if they found that he did not mail the post card, on the theory that the June 7, 1954 letter (see *supra,* p. 6), may be "construed by

the Jury as constituting notice of an address where [petitioner] could at all times be reached by mail" (R. 194). In accordance with this request, the court gave this additional instruction (R. 199):

> Defense Counsel have called my attention to the fact that it is one of their contentions that there was a previous letter in the file in which the defendant had stated something about where mail would reach him. It is, therefore, their contention that whether or not he mailed the letter of February 1, 1955, on their theory of the case, there was a place where mail would reach him and he therefore had complied. I call that to your attention because I had overlooked that contention of the defendant in summarizing the issues on that count.

As the court explained to defense counsel immediately thereafter, in the presence of the jury: "If the Jury find that the defendant had at all times kept the Board advised where mail would reach him, then of course he is to be acquitted" (R. 200). Defense counsel found these instructions "satisfactory" (R. 200).

On the question of knowledge and intent, the court instructed, in pertinent part, as follows (R. 186–187):[9]

> In the defendant's case, * * * if you find that he failed to do something he should have done but you find that it was done by mistake or inadvertence or some good excuse, certainly he shouldn't be convicted * * *. On the other hand, if you find that he did something knowingly

[9] The instructions on intent were meant to apply generally to each of the three charges on which petitioner had been tried.

> and with intent to disobey or to disregard the law, then you have a different situation entirely. Your decision may be the reverse.

And again (R. 187–188):

> You will note that the omission or failure to act as charged in the indictment is alleg d to have been "knowingly" done. The purpose of adding the word "knowingly" was to insure that no one would be convicted because of a failure to act due to mistake or inadvertence or other innocent reason.

## SUMMARY OF ARGUMENT

A. Before turning to an examination of the sufficiency of the evidence and the propriety of the instructions in this case—the only challenges raised by petitioner to his conviction for having knowingly failed, in February 1955, to advise his local draft board of an address where mail could reach him [10]—we believe it will be useful to examine the significance of this address-notification duty in the overall operation and effectiveness of the Universal Military Training Program.

The success of a military training program depends in large measure upon the speed with which its administrative machinery can be activated to meet the manpower needs of war or national emergency. See *Falbo* v. *United States*, 320 U.S. 549, 551–552. Such success, however, cannot be achieved solely through the efforts of a pool of experienced personnel, no mat-

[10] As we have pointed out (*supra*, p. 2, fn. 1), petitioner does not, at this stage of the case, urge that he was denied a speedy trial.

ter how dedicated; it requires, at least in equal measure, the cooperation of each draft registrant. Unless the registrant keeps his local board advised at all times of an address where mail can promptly reach him, the Selective Service System would be thwarted at the critical moment which gave rise to the need for extraordinary and speedy measures.

The crucial importance of the address-notification requirement is emphasized in the Selective Service Regulations and Forms, which repeatedly remind the registrant of his duty to keep the local board advised of his current address. See, for example, 32 C.F.R. 1613.12(a) and (b) (1961 supp.), and Instruction No. 5, *Selective Service System Classification Questionnaire at* R. 217. Beyond these particularized duties, Section 1641.3 of the regulations imposes a continuing obligation on the registrant to "keep his local board advised at all times of the address where mail will reach him", and Section 12(a) of the Act makes a knowing failure "to perform such duty" a criminal offense (see *supra,* pp. 2–3). It is this fundamental duty which it is alleged that petitioner knowingly violated. As we now show, he was convicted of this charge upon sufficient evidence and under proper instructions.

B. The challenge to the sufficiency of the evidence in this case relates primarily to factual matters within the province of the jury which were resolved by the jury against petitioner. The jury's verdict has the support of both courts below. Petitioner submits no sound basis for overturning these findings. Cf. *De-*

*laney* v. *United States*, 263 U.S. 586, 589–590; *United States* v. *Johnson*, 319 U.S. 503, 518.

1. The evidence reveals two distinct patterns of behavior on petitioner's part with respect to his address-notification duty. The first (before the period charged in the indictment) is characterized by scrupulous compliance with the obligation. Starting in August, 1950,[11] petitioner conscientiously advised his local board of some five changes of address—three of which were in San Diego. Moreover, these San Diego addresses included his personal as well as his parents' residences. The second pattern (after he notified his board in June 1954 of his move from San Diego to Modesto, California)—during the period in which he no longer hoped to be exempted from service—was marked by a complete reversal in form. Commencing with his departure from Modesto in February 1955, and up until April 1956, petitioner failed to notify his board of any address where mail could reach him and he took no alternative measures to provide for the receipt of draft board mail sent to Modesto.[12] From all the evidence the jury had sufficient grounds to find that, when petitioner left Modesto in February 1955, he knowingly failed in his duty to make provision for the receipt of draft board mail which thereafter might be sent to him in that city.

[11] Petitioner had registered for the draft in 1948.

[12] After he left Modesto and during the remainder of 1955, petitioner resided at five different addresses.

2. Petitioner makes a three-pronged attack on the sufficiency of the evidence. None of his claims affects the validity of his conviction.

*a.* His contention that he did notify the draft board by post card of his parents' new address late in February 1955, following his departure from Modesto, was a factual assertion which the jury could and did disbelieve (see the Statement, *supra,* pp. 7–8).

*b.* Nor is there merit to petitioner's claim that, regardless of whether or not he sent the change of address notification in February 1955, he could have expected mail to reach him at his parents' San Diego address in view of the statement in his June 7, 1954 letter that he could be reached "within one or two days" at that address. The tenor of the June 7 letter (see *supra,* p. 6) reveals that petitioner designated his parents' San Diego address as a subsidiary address to which he expected draft board mail to be sent only if the board could not contact him in Modesto.

Essentially, petitioner's argument comes down to the claim that a registrant can, with impunity, simultaneously furnish various addresses to his board and thereafter change his mailing address at will without notifying the board or leaving forwarding directions, and then complacently wait until the board has exhausted every possible source that might disclose his whereabouts. But such random compliance with the Selective Service Regulations would be to place a premium on planned non-cooperation, which, as we have

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indicated, would in war or national emergency critically hinder rapid mobilization (see *supra,* pp. 12–13).

In any event, the evidence refutes petitioner's contention that he could have reasonably expected, in February 1955, that draft board mail would be sent to his parents' former San Diego address, and by that route come into his possession in time for compliance.

First, the jury could have rationally inferred that, in mailing the June 7, 1954 letter to the board—well knowing that his parents' San Diego address was on file as his last previous mailing address—petitioner himself recognized that the San Diego address no longer sufficed to meet his known duty to keep his local board advised at all times of an address where mail could reach him. Secondly, although the jury rejected petitioner's factual defense that he mailed a change of address notification to his board in February 1955, they could accept the implicit postulate in that testimony—that petitioner himself fully recognized and understood that when he left Modesto in February 1955, he was required, in some reasonable fashion, to comply with the address-notification requirements of the regulations. Considering this evidence together with petitioner's past history of strict compliance with the notice requirements, the jury could conclude that, when petitioner left Modesto in February 1955, he knew he had a duty to inform the board of a new address, or make other reasonable provision that mail thereafter sent to Modesto would reach him promptly, and that he did not take any action to this end.

We recognize that a "knowing" violation of the notice requirements is essential to support a conviction and that not every address, however temporary, must be given the draft board. See *Bartchy* v. *United States,* 319 U.S. 484, 488; *Ward* v. *United States,* 344 U.S. 924. To sustain a conviction, the evidence must establish that the registrant failed in bad faith to take precautions (either by advising the board of his current address, or by making provision for a chain of forwarding addresses) so that "mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance". *Bartchy* v. *United States, supra,* 319 U.S. at 489. The evidence in this case meets these standards.

*c.* Finally, there is no merit to petitioner's assertion that his conviction must fall because the government failed to prove that, if orders of the board had been sent to Modesto in February 1955 (instead of September and October 1955), petitioner would not have received them in time for compliance. Petitioner has misconstrued the offense on which he was convicted. The obligation to keep the draft board informed of an address through which the registrant can be reached is an important duty, independent of the obligation to report for induction. Failure to comply with that duty in February 1955 is not immunized from punishment because the board's actual directives to petitioner were mailed during a later time period.

C. The instructions of the trial court were wholly proper.

1. Proof of a "knowing" violation of the notice requirements is essential to the validity of a conviction under Section 12(a), and this question must be resolved by the jury under proper instructions. The trial court properly complied with this requirement; it admonished the jury that only a "knowing" violation constituted criminal conduct (see *supra*, pp. 11–12).

2. There is no merit to petitioner's claim that the trial court committed reversible error in refusing to give his requested instructions Numbers 45 and 46.

*a.* These requests to charge, in essence, asked the court to direct the jury that, unless the government showed by clear evidence that the change-of-address post card allegedly mailed in February 1955 was not received by the board, then it had to acquit petitioner (R. 17–18).

Under the court's instructions the sole issue for the jury was whether petitioner had *mailed* the card. If it was mailed, then the jury was required to find that petitioner had complied with the notification requirements (see *supra*, p. 10). The trial court's instructions were thus more beneficial than petitioner requested.

*b.* Petitioner has apparently confused the court's instructions on the notice issue with those of the court on the other charges on which he was simultaneously tried (failure to report for induction on November 8, 1955 and April 9, 1956), but on which

the jury reached no verdict. We do not understand how the instructions relating to the counts upon which the jury could not agree can now be subject to challenge, or how they affected the clear instructions given by the court on the count on which petitioner was convicted.

*c.* If petitioner is actually urging that the government was bound to prove *by direct evidence* that he did not mail the post card, he is seeking to impose an impossible burden of proof on the prosecution, as well as advocating the adoption of a unique rule in the trial of a criminal case. The government had no way of proving directly that petitioner did not mail the card. Only he or his witnesses could provide such information. See *United States* v. *Fleischman,* 339 U.S. 349, 360–362. The government adduced the only evidence it had at its disposal—that the post card was not received at the local board (see the Statement, *supra,* pp. 7–8). Its showing in this respect was certainly sufficient to shift the burden of going forward to petitioner to adduce testimony as to mailing, which he alone could provide. The jury, which was directed to assess this testimony, could and did reject it.

## ARGUMENT

### THE COURT OF APPEALS PROPERLY AFFIRMED PETITIONER'S CONVICTION FOR HAVING KNOWINGLY FAILED TO KEEP HIS DRAFT BOARD ADVISED OF AN ADDRESS WHERE MAIL COULD REACH HIM

Petitioner was convicted by the jury of having knowingly failed, in February 1955, to advise his local draft board of an address where mail could reach him,

in violation of Section 12 of the Universal Military Training and Service Act and Section 1641.3 of the Selective Service Regulations (*supra*, pp. 2–3). Before turning to the challenges to his conviction urged by petitioner [13]—the sufficiency of the evidence and the propriety of the instructions—we believe it will be useful to examine the significance of this address-notification duty in the overall operation of the Universal Military Training Program. This examination will demonstrate, we submit, the crucial nature of the duty and, correspondingly, will underscore the grave consequences that would flow from widespread disobedience.

A. A SUCCESSFUL MILITARY TRAINING PROGRAM DEPENDS LARGELY UPON COMPLIANCE BY THE DRAFT-REGISTRANT WITH HIS DUTY OF KEEPING HIS DRAFT BOARD ADVISED OF AN ADDRESS WHERE MAIL WILL REACH HIM

The success of a military training program depends upon how speedily and efficiently its administrative machinery can be triggered into operation to meet the manpower requirements of war or national emergency. As this Court observed in *Falbo* v. *United States*, 320 U.S. 549, 551–552, concerning the transfer of national manpower resources to war activities under the Selective Training and Service Act of 1940:

> When the Selective Training and Service Act was passed in September 1940, most of the world was at war. The preamble of the Act declared it "imperative to increase and train the personnel of the armed forces of the United

[13] As already noted (*supra*, p. 2, fn. 1), petitioner has abandoned at this stage of the case the claim that he was denied a speedy trial.

> States." The danger of attack by our present enemies, if not imminent, was real, as subsequent events have grimly demonstrated. The Congress was faced with the urgent necessity of integrating all the nation's people and forces for national defense. That dire consequences might flow from apathy and delay was well understood. Accordingly the Act was passed to mobilize national manpower with the speed which that necessity and understanding required.

The numerous procedures established by the Selective Service Regulations governing registration, classification, selection, and induction, were not meant to be self-executing. Not only does the effective operation of the draft mechanism require dedicated and effective personnel working at all levels on the enormous task of classifying, inspecting, selecting, and inducting a great heterogenous group of men, but it requires also the active cooperation of those members of the citizenry subject to the law. Just as the federal tax system cannot collect revenue without the active cooperation of the taxpayer (cf. *Spies* v. *United States,* 317 U.S. 492, 495), so the military training program must, in large part, rely for the achievement of its goal on the direct aid of the draft-registrant. In view of the immense proportions and complexity of the task of general mobilization, it is manifest that, if the local board were required to expend its energies and time in a trial and error process of locating registrants, the very inadequacy of the process would thwart the Selective Service System at the critical moment which gave

rise to the need for extraordinary and speedy measures. If there is to be "'a prompt and unhesitating obedience to orders' issued in [the draft] process* * *" (*Falbo* v. *United States, supra,* 320 U.S. at 554)—the *sina qua non* of effective national defense through a citizen army—the local board must be in a position to transmit to the registrant speedily those orders to which he owes "unhesitating obedience." The local board must therefore be able to contact the registrant promptly; and this means that it must be kept advised at all times by the registrant of an address where mail will reach him.

Recognizing the critical importance of this need for ready communication, the Selective Service Regulations and Forms make repeated reference to the address-notification responsibilities of the registrant. For example, at the very inception of the draft procedure (*i.e.,* registration), the regulations direct the registrar to "take extreme care" that the residence of the registrant is correctly entered on the "Registration Card" and to "advise the registrant that a correct mailing address is most important because it is the address to which all notices * * * will be sent, and that he must advise his local board each time there is a change in his mailing address" (32 C.F.R. 1613.12 (a) and (b) (1961 supp.)); the "Classification Questionnaire", which is mailed to the registrant following the registration procedures (32 C.F.R. 1621.8–1621.10), instructs that after it has been returned the registrant is to report to his local board "at once any change of address * * *" (see Instruction No. 5, *Selective Service System Classification*

*Questionnaire* at R. 217); the "Cover Sheet", prepared for each registrant before the mailing of the Questionnaire, which is kept at the local board as the file of all papers and documents pertinent to the registrant (see 32 C.F.R. 1621.8), provides spaces to indicate changes in address so as to reflect at all times his current address (see *Cover Sheet*, R. 211, 213, 215); and the "Notice of Classification" sent to the registrant (32 C.F.R. 1623.4–1623.5 (1961 supp.)) directs him to notify the local draft board of any change of address (see *Notice of Classification* at R. 228); and the registrant is directed to report to his local board "within 10 days" any change in his "home address" (32 C.F.R. 1641.7(a) (1961 Supp.). Beyond these particularized duties, Section 1641.3 of the regulations imposes a continuing obligation on the registrant to keep his local board advised at all times of the address where mail will reach him", and Section 12(a) of the Act makes a knowing failure "to perform such duty" a criminal offense (see *supra* pp. 2–3).[14]

In sum, the charge on which petitioner stands convicted does not derive from some highly technical, obtuse, or formalistic requirement. Rather, it stems from one of the core premises underlying successful mobilization through the Selective Service System. It rests on the valid assumption that, unless the registrant advises his local board of an address where mail will reach him in time for compliance with the board's directives, the selective service machinery cannot be utilized effectively for the speedy and efficient raising

[14] The Act itself (Section 15(b); 50 U.S.C. App. 465(b)) further directs the registrant to "keep his local board informed as to his current address * * *".

and maintenance of our armed forces. It is this basic duty which it is alleged that petitioner knowingly violated. As we now show, he was convicted of this charge upon sufficient evidence and under proper instructions.

### B. THE JURY'S VERDICT WAS BASED ON SUFFICIENT EVIDENCE

The sufficiency of the evidence to support petitioner's conviction for having knowingly failed to keep his local board advised in February 1955 of an address where mail would reach him depends in large measure upon issues of credibility—an appraisal of petitioner's conduct and the inferences which might be properly drawn from such behavior, particularly on the issue of knowledge and intent. The issues in this case thus relate primarily to factual matters within the province of the jury, which were resolved by the jury against petitioner and which have the support of both courts below. Not only are these findings entitled to great weight (see, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 80; *Delaney* v. *United States*, 263 U.S. 586, 589–590; *United States* v. *Johnson*, 319 U.S. 503, 518), but petitioner suggests no sound reason why this Court should overturn them.

1. In outline, the evidence shows that, on June 7, 1954, petitioner sent a registered letter to his local draft board advising it that he was moving from San Diego to Modesto, California; informing the board of his "new address" in that city; and concluding with the comment that he could be reached "within one or two days" at the San Diego address

that he had last previously given his board.[15] The evidence further shows that his notification of his move to Modesto in June 1954 was in conformity with his past dealings with the board. Petitioner, who had registered for the draft in 1948, had subsequently notified his local board of each change of address—some five changes.[16] Nor had he, during this period, simply advised his local board of his parents' addresses. On the contrary, the first San Diego address he gave the board (in September 1951) was his "personal address" in that city (R. 128). Thereafter, and up until the June 1954 letter, he had advised the board on three later occasions of changes in his mailing address in San Diego (see *Cover Sheet*, R. 211, 213, 215, lines 3–5). As Mrs. Haisch (the draft board clerk) stated, petitioner had been "prompt and careful" about sending the board notification of changes in address (R. 77).

The evidence reveals a sudden reversal in this pattern of scrupulous compliance, commencing in February 1955. On February 7, petitioner left Modesto for Los Angeles but, at that time, he gave the local board no notice; nor did he leave a forwarding address with the Modesto post office. Some two weeks later, petitioner returned to San Diego for a few days (February 19–20), to assist his parents in moving from 11th Street to 30th Street in San Diego. The jury could find that, on his return to Los Angeles,

[15] This was the then address of his parents, 650 Eleventh Street.

[16] The one apparent exception was in July 1950, which petitioner rectified some two months later (see *supra*, p. 4 n. 5).

he failed to advise his board of his parents' new address as the location where mail would reach him (see *infra*, pp. 27–28). There is certainly no question that he failed to advise the Post Office Department of his parents' new address.

The evidence, in sum, discloses two totally dissimilar patterns of action by petitioner. The first—scrupulous notification as to changes of address—occurred during a period when petitioner was attempting to get his 1–A draft classification changed (see the Statement, *supra*, p. 4).[17] The second—complete disregard of the address-notification duties—took place after administrative review of his 1–A classification had finally terminated.[18] From all of this evidence the jury had a proper basis for finding that, when petitioner left Modesto in February 1955, he knowingly failed in his duty to make provision for the receipt of draft board mail sent to him in that city.

2. Petitioner makes three challenges to the sufficiency of the evidence. He says: (a) that he did notify his local board of his parents' new address late in February 1955, following his departure from Modesto; (b) that, in light of the contents of the June 7, 1954 letter in which he mentioned his parents' old

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[17] In fact, two of the addresses which petitioner sent the board before June 1954 had been sent during the prior six months while petitioner was prosecuting an appeal from his January 1953 classification in 1–A (R. 126–127; *Cover Sheet*, R. 211, 213, 215, lines 4 and 5).

[18] It should also be noted that, although petitioner had some five different residences during the remainder of 1955, he admittedly did not notify his board of any of them (R. 132–133).

San Diego address, he could reasonably expect that draft board mail would reach him by way of that address; and (c) that, in any event, his conviction must fall since no draft board notices were sent to him in February 1955, the only period of time covered in the indictment (Pet. Br. 20–33). None of these claims affects the validity of the conviction.

*a.* Petitioner testified that he had mailed a change-of-address post card in February 1955, following his parents' move to a new address in San Diego, and that he informed the Board on this card that this was the address to which his mail should thereafter be sent (R. 109–110; see also R. 145–146). Mrs. Haisch, who was in "complete charge" of all the files at petitioner's local board and who had the duty "to open and stamp all of the incoming mail" (R. 49), testified that no post card from petitioner was received in February 1955 and that, in fact, no correspondence was received by the draft board from petitioner during the entire year of 1955. She testified further that, even though petitioner's file was out of the draft board office during this period of time, any mail received from petitioner would have been placed in a "dummy" file; and that, in an effort to discover if the card had been misfiled, she and another clerk made a thorough search through some 3,000 draft files in the office of the board but failed to turn up petitioner's card (see the Statement, *supra,* p. 8). Moreover, although petitioner claimed he had placed a return address on the post card, he did not assert that it had been returned to him. The jury also had evidence that petitioner took no alternative action in February 1955 to see to it that he would

come into possession of draft board mail sent to his address in Modesto in time for compliance. It is undisputed that he did not [redacted] notify the post office in Modesto of any forwarding address. Nor does the record indicate any effort on his part to check at the Modesto address for mail, or to make any other serious provision that mail sent to Modesto would be promptly forwarded to him (R. 130).[19]

The short of it is that the jury who saw the witnesses and heard the evidence could disbelieve petitioner's version of events and conclude instead that he mailed no postcard and made no other arrangement in February 1955 to have draft board mail sent to Modesto come into his possession in time for compliance. Cf. *United States* v. *Groopman,* 147 F. 2d 782, 784–785 (C.A. 2), certiorari denied, 326 U.S. 745; *Word* v. *United States,* 199 F. 2d 625, 626–627 (C.A. 10), certiorari denied, 345 U.S. 936.

*b.* There is no merit in petitioner's further claim—that, since his letter of June 7, 1954 also contained the concluding statement that he could be reached "within one or two days" at his parents' San Diego address at that time (650 Eleventh Street), he could have expected mail to reach him by way of that address even after he left Modesto in February 1955, and therefore he should not have been convicted of having know-

[19] Petitioner claimed that when he left Modesto he requested Mr. Morrison, his employer in that city, to forward mail sent to Modesto to his parents' address at 650 Eleventh Street in San Diego (R. 131). But petitioner did not offer the testimony of Mr. Morrison on this issue and the jury could disbelieve the claim.

ingly violated the address-notification requirements of the Selective Service Regulations (Pet. Br. 22–24, 27–28).

In this connection, petitioner (Pet. Br. 24–25) relies upon the testimony of the draft board clerk (Mrs. Haisch) to the effect that, even after the receipt of the June 7, 1954, letter she knew that petitioner could be reached at his parents' San Diego address, and that she had noted this fact in the file (R. 67–68). But an examination of the contents of the June 7, 1954 letter (*supra*, p. 6), reveals that petitioner did not advise the board, as he could easily have done, that he intended the Modesto and San Diego addresses to be considered as alternative permanent addresses, or that the Modesto residence was only temporary and that the board should continue to send all of his mail to his parents' San Diego address. On the contrary, the June 7 letter reveals plainly that petitioner designated Modesto as his principal and permanent "new address". The clear implication to be drawn from his correspondence is that he wanted all draft board mail sent there in the first instance. To the extent that the letter also referred to his parents' San Diego address, this was apparently meant to provide a subsidiary or secondary mailing address to the board—an address where mail could reach petitioner *if* he could *not* be located at his Modesto address. Mrs. Haisch so understood the letter and, as she said, the notation was to serve as a reminder "that if any mail were returned to us from the Modesto address * * * I would look for or try and contact [petitioner] through his San Diego address" (R. 67).

Considered against this factual background, petitioner's argument seems to amount to the following: Even though petitioner moved in February from the address (in Modesto) which he had given the board (without notifying the board of that fact or providing a chain of forwarding addresses) and even though his parents moved in February from the San Diego address which petitioner had given earlier (without—as the jury found—petitioner's giving any notice of that fact), petitioner could reasonably expect the board to trace the new address of his parents and through them his new location.[20] Under this reasoning, a registrant could, with impunity, simultaneously furnish various addresses (permanent as well as transitory) to his local board, and thereafter change his mailing address at will without notifying the board or leaving forwarding directions, and then complacently wait until the board has exhausted every possible source that might disclose his whereabouts. But, as we have already suggested, to view such desultory or random compliance as enough to satisfy the address-notification requirements of the regulations would be to place a premium on planned non-cooperation, which in war or national emergency could critically hinder the rapid mobilization of manpower.

We do not say that a draft registrant is subject to criminal sanctions because he does not proceed, in petitioner's language, "as if he were a lawyer before the draft board" (Pet. Br. 26). We do say, however,

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[20] Petitioner moved extensively in 1955, having some five residences in the Los Angeles area (see the Statement, *supra*, pp. 8–9).

that he is subject to the rigors of prosecution and conviction where he *knowingly* fails to comply with one of the central duties imposed upon him by the Selective Service Regulations—*i.e.*, advising his board of a particular address where mail can reach him. When he knows that he has failed to keep the board abreast of his new location, he cannot excuse himself by insisting that the board could have traced him through some earlier address previously given on another occasion.

In any event, the evidence refutes petitioner's contention that he could have reasonably expected, in February 1955, that draft board mail would be sent to his parents' former San Diego address, and by that route come into his possession in time for compliance. In the first place, if, as petitioner claims, he truly intended to retain his parents' San Diego address as his mailing address when he moved to Modesto, it is difficult to understand why he sent the letter of June 7, 1954, at all. His parents' address was already on file at the board, being the last previous address he had provided. Nevertheless, he sent a registered letter informing the board of his "departure" from San Diego and of his "new address" in Modesto. We submit that the jury could consider this action as a purposeful and knowing transmittal by petitioner to the board of a new mailing address, consistent with his past conduct of regularly transmitting changes of address whenever his mailing address changed (see *supra*, p. 25). Indeed, the jury could have rationally inferred that in mailing this letter petitioner himself recognized that

his previous San Diego address no longer sufficed to fulfill his known duty to keep his local board advised at all times of an address where mail could reach him. From the tenor of the letter and in consideration of petitioner's past conduct, it is a fair inference that he considered his move to Modesto in June 1954 a significant change in residence and domicile. As he himself testified, he received about one letter "every other week" while living in Modesto (R. 130). Consequently, the jury could further find that, when petitioner left Modesto in February 1955, he knew he was required to take some action to insure that he would receive mail which might thereafter be sent to this former address.

This conclusion gains added strength from petitioner's own testimony at the trial. According to petitioner, after he left Modesto in February 1955, and following his parents' relocation on Thirtieth Street in San Diego, he notified his local board by post card that mail could reach him at his parents' new address (see *supra,* pp. 7, 27). He testified that he informed the board in the post card that his "new home address" was the new address of his parents at 1120 30th Street, San Diego, and further told them he "was no longer at Modesto," and that all mail should be sent to this new address (R. 110). When asked by his counsel why he sent this notification to the board, petitioner explained that when he left Modesto he commenced "traveling from place to place" and he "knew that the Board had to have a permanent address" at which to contact him (R. 110).

As we have already pointed out, the jury, on ample evidence, resolved against petitioner the factual defense that he had mailed the card in February 1955 (see *supra*, pp. 27–28). In so doing, however, there was no reason for the jury to reject the underlying postulate of that testimony—that petitioner himself fully recognized and understood that when he left Modesto in February 1955 he was required, in some reasonable fashion, to comply with the address-notification requirements of the Selective Service Regulations. On the contrary, the jury could consider his testimony as an implicit admission that he had such a duty. And, apart from this testimony, the jury had evidence that petitioner had strictly complied with the notice requirements theretofore, even when a change of address occurred in the same city (San Diego). It also knew that when he took up residence in Modesto petitioner notified his local board of this fact. In considering these circumstances, the jury had ample reason to conclude that, when petitioner testified that he complied with the duty of notification in February 1955, such a duty did exist and petitioner was fully cognizant of it. As with any other witness, the jury had the right to accept or reject defendant's testimony, or any part of it, as it saw fit. *United States* v. *Groopman*, 147 F. 2d 782, 784, 785 (C.A. 2), certiorari denied, 326 U.S. 745; *Word* v. *United States*, 199 F. 2d 625, 626–627 (C.A. 10), certiorari denied, 345 U.S. 936; *United States* v. *Linenberg*, 179 F. Supp. 808, 812 (E.D. Pa.). It was authorized to reject petitioner's claim that he mailed the post card in February

1955, yet to accept the representation implicit in his testimony that he knew he had the duty in February 1955 to notify the board of a change in address.

We recognize that "[n]ot every failure to perform a duty imposed by the statute or regulations is made criminal; only a person 'who shall knowingly fail or neglect' his duty is to be punished." *United States* v. *Trypuc*, 136 F. 2d 900, 901 (C.A. 2). See, also, *Bartchy* v. *United States*, 319 U.S. 484, 488–489; *Ward* v. *United States*, 344 U.S. 924; *Caldwell* v. *United States*, 139 F. 2d 121, 124 (C.A. 5); *United States* v. *Hoffman*, 137 F. 2d 416, 419 (C.A. 2). Similarly, we recognize that a case of this sort is not proved simply because a draft registrant failed "to notify the local board of every move or every address * * *" (*Bartchy* v. *United States*, 319 U.S. 484, 488; *Caldwell* v. *United States*, 139 F. 2d 121, 124 (C.A. 5)). In order to support a conviction, the evidence must be sufficient to show that the registrant failed in bad faith to take precautions (either by providing the local board with his current address, or by some alternative act, as by making reasonable provision for a chain of forwarding addresses), so that "mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance." *Bartchy* v. *United States, supra*, 319 U.S. at 489.

It was under these standards that petitioner was convicted in this case. This Court in *Bartchy, supra*, framed the test in terms of what the registrant could reasonably be expected to do under the circumstances.

Cf. *United States* v. *Trypuc, supra; United States* v. *Haug,* 150 F. 2d 911 (C.A. 2). In the light of all the circumstances, the jury could properly find that petitioner could reasonably be expected to notify the draft board of a change of address when he left Modesto or, in the alternative, provide a chain of forwarding addresses, and that he knowingly failed to do either.

Nor is this case, as petitioner alleges (Pet. Br. 32–33), like *Ward* v. *United States,* 195 F. 2d 441 (C.A. 5), reversed *per curiam,* 344 U.S. 924. There, although a local draft board had notice from the return of its unopened communications sent to various addresses provided by the registrant that he was not at these addresses, it did not send any mail to the address of the registrant's employer, provided on the classification questionnaire, which the registrant claimed at the trial he relied upon as his mailing address. Here, as we have shown, the jury could find that the local board would not, in February 1955, have had reason to believe that Modesto was no longer petitioner's mailing address. In fact, subsequent events proved this to be so. When the time came for the board to get in touch with petitioner, even if it desired to undertake an extensive search for him (see R. 69, 74),[21] it had no reason to do so since

[21] If a draft board has notice that a registrant cannot be located through the address he has provided, failure to follow up other clues as to his whereabouts would not excuse the registrant's own violation or constitute a valid defense to prosecution. The regulations provide that "if the local board believes by reasonable effort it may be able to locate the registrant and

the mail sent to the last address he had given (Modesto) was never returned to the board. It thus had no way of knowing that petitioner had not received the notices sent in September and October 1955. As the clerk of the board (Mrs. Haisch) testified, since the order to report for induction sent out on October 28, 1955, "was not returned to us * * * we assumed [petitioner] received it [and] * * * did not contact anyone else or try to contact anyone else" (R. 73; see also R. 67, 69, 74).

*c.* There is likewise no merit to petitioner's related contention (Pet. Br. 23, 25–27) that his conviction cannot stand since the government failed to prove that if orders of the board had been sent to Modesto in February 1955 (instead of September and October 1955) petitioner would not have received those orders in time for compliance.[22]

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secure his compliance", it may attempt to locate him for a period not in excess of 30 days before reporting his delinquency to the United States Attorney. See 32 C.F.R. 1642.41 (a) and (b). And another regulation under part 1642 provides (32 C.F.R. 1642.3):

"*Compliance with procedures of this part not condition precedent to prosecution.* Compliance by a local board or any other agency of the Selective Service System with any or all of the procedures prescribed by the regulations in this part is not a condition precedent to the prosecution of any person under the provisions of section 12 of title I of the Universal Military Training and Service Act, as amended."

[22] As the Selective Service Regulations make clear (see 32 C.F.R. 1642.2), the duty which petitioner was convicted of violating was a continuing one. See *United States* v. *Guertler*, 147 F. 2d 796 (C.A. 2), certiorari denied, 325 U.S. 879). For some unexplained reason, however, the indictment limited the period of the offense to "on or about February 1, 1955" (R.

If petitioner means by this contention that the government did not prove that he failed to furnish his board with an address where mail would reach him during February 1955, then he is merely rearguing the factual issues already discussed, and which we have shown were properly resolved against him by the jury on sufficient evidence. If, on the other hand, he is contending that the offense does not occur unless, during the period charged, the registrant failed in timely fashion to respond to orders of the board, then he is wholly misconstruing the nature of the offense. The offense for which petitioner was convicted is not that he failed to report for induction on any particular date, but that he knowingly failed to provide the board with an address where mail would reach him in time to respond to such or any other orders of the board. And while it is true that, as a practical matter, this offense would usually come to the attention of the board only if the registrant failed to respond to the board's directives, it does not follow that the registrant's failure to comply with such directives must occur during the same period of time in which he failed to notify the board of a change of address. The obligation to keep the draft board informed of

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3–4). In the course of his instructions—in light of petitioner's claim that he had sent a change-of-address notice to the draft board in the latter part of February—the trial judge instructed that proof of the offense at any time during the month of February 1955 would support the charge in the indictment (see the Statement, *supra*, pp. 10–11).

Of course, as the court below held—and petitioner makes no such claim—there was no variance between the indictment date (on or about February 1, 1955) and the actual proof. The dates were, in fact, substantially the same (see R. 254, n. 5).

an address through which the registrant can be reached is an important independent duty (see *supra*, pp. 20–24).

As we have emphasized, the crucial question in this case is whether "mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance." *Bartchy* v. *United States*, *supra*. The jury was satisfied that, when petitioner left Modesto in February 1955, he did not reasonably expect that mail sent by the board to that address would come into his possession in time, and that he nevertheless knowingly failed to take any action to remedy that situation.

C. THE INSTRUCTIONS OF THE TRIAL COURT WERE PROPER

1. We have already adverted to the fact that proof of a "knowing" violation is essential to a finding of guilt in a case of this sort (see *supra*, pp. 30–31, 34). The existence of intent is, of course, a question for the jury. *United States* v. *Hoffman*, 137 F. 2d 416, (C.A. 2), cf. *United States* v. *Weiss*, 162 F. 2d 447 (C.A. 2), certiorari denied, 332 U.S. 767. It is therefore of crucial importance that this issue of knowledge be left to the jury under proper instructions. See *United States* v. *Trypuc*, 136 F. 2d 900 (C.A. 2) and *United States* v. *Haug*, 150 F. 2d 911 (C.A. 2), where the failure of the trial court properly to instruct on knowledge led to the reversal of the registrants' convictions.[23]

[23] In *Trypuc* the court of appeals reversed a conviction for knowingly failing to keep a draft board advised of an address,

There was no such defect in the court's instructions to the jury in this case. Early in its charge the court stated the test of knowledge in accord with the formulation in *Bartchy* v. *United States, supra,* 319 U.S. at 489. The court said (R. 176):

> You are * * * instructed that a Registrant is not required to remain in one place or to notify the Local Board of every address even if the address is temporary. The Regulation is satisfied when the Registrant, in good faith, provides an address by which mail sent to that address furnished to the Board may be by the Registrant reasonably expected to come into his hands in time for compliance.

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where the trial court had omitted to instruct the jury that they must find that the defendant "knowingly" failed to keep his board so advised. See *United States* v. *Guertler*, 147 F. 2d 796, 797 (C.A. 2), certiorari denied, 325 U.S. 879, in which the Second Circuit, in distinguishing its *Trypuc* decision, commented: "* * * the error we found there [in *Trypuc*] was the charge of the district judge to the effect that the failure of the defendant to notify the board of his correct address was a crime. We pointed out that the issue was not the correctness of the address, but 'whether the appellant "knowingly" failed to keep the Board advised of an address where the mail would reach him.'"

The *Haug* case involved a Norwegian sailor who gave as his address on his Registration Card the "Seamen's Church Institute" in New York where he lived at the time but from where he shipped out to sea, being absent most of the time during the periods relevant to the case. Haug's defense was that the Selective Service System notifications delivered to the Institute were sent under an erroneous name and would not have been delivered to him even had he called for his mail. The court of appeals held that the issue of whether, under such circumstances, Haug had kept his draft board advised depended on whether it was Haug's intent to call at the Institute for his mail from time to time and that the trial court had never instructed the jury on this issue.

The court further observed that in his dealings with his draft board the defendant "is not to be considered * * * as though he were engaged in litigation represented by a lawyer, but you must consider his actions in the same way as any other man his age, intelligence, background and experience" (R. 176). The judge later charged that only if the jury found that petitioner "did something knowingly and with intent to disobey or disregard the law" could he be convicted (R. 186–187), and that "[t]he purpose of adding the word 'knowingly' [to the indictment] was to insure that no one would be convicted because of a failure to act due to mistake or inadvertence or other innocent reason" (R. 187–188). The court's instructions, in short, repeatedly admonished the jury that only a "knowing" violation of the address-notification requirements constituted criminal conduct.

2. Petitioner challenges the court's instructions on the ground (Pet. Br. 34–38) that it was reversible error not to give his requested instructions Numbers 45 and 46. These points, too, are unsound.

*a.* Number 45 requested, in essence, that the jury be charged that it could not find that the change-of-address post card, allegedly sent by petitioner to the board in February 1955, was not received solely because it was not found in petitioner's draft board file, but that "it is upon the Government to show by clear and convincing evidence beyond a reasonable doubt that the card was not received * * * established by witnesses whose duty it was to process the incoming mail or who actually did handle and process the mail at the time in question." Number 46 requested that

the jury be told that there was a factual assumption that, if the card was mailed, it was received; that this presumption could not be overcome by the presumption that "the board employees performed their duty" in handling incoming mail; and that the government had to prove that "the card actually was not received by the board" (R. 17–18). Petitioner's challenge in this regard is wholly without merit. Not only were the instructions given by the court on the post card issue entirely proper, but, in fact, they were more beneficial to petitioner's cause than the instructions he actually sought.

The court instructed the jury with particularity that "if you find the defendant did mail that change of address as he testified he did, then your duty on that count is to acquit him" (R. 179). And again (R. 184):

> * * * if you find and believe that the defendant deposited in the United States Mail in Los Angeles in February, 1955 a card notifying the Local Board of the change of address, *then whether or not the card was received by the Local Board*, the defendant should be acquitted on count two in the second indictment [Emphasis added.] [See also R. 185, 188–189, 190].

Under the court's instructions, the jury was to resolve the issue of whether petitioner had complied with his duty of notification in February 1955, not in terms of whether the post card was *received* by the local board but in terms of whether the card was *mailed* by petitioner. If it was mailed, then the jury was required to find that petitioner had complied with the notifica-

tion requirements, regardless of any doctrine of administrative regularity in processing and filing incoming mail. Hence, there is no relevance to petitioner's argument that the court should have charged as he requested on the question of *receipt* (Br. 37), for that question was not involved at all under the court's theory of the case. The sole issue for the jury was whether petitioner had *mailed* the card.

In addition, the trial court stated generally that a properly addressed and mailed letter or card is presumed to have been received by the addressee in the due course of the mails, that before such a presumption arises there must "be clear proof of the mailing" and proof that the communication was "properly addressed", and that the presumption would not arise unless it were shown that the addressee "was at or in contact with the place to which the communication was mailed " (R. 175–176). In view of these instructions, the trial court was correct in rejecting petitioner's requests to charge "as not adding anything to the other instructions given * * *" (R. 162). See *Sugarman* v. *United States*, 249 U.S. 182, 185; *Shibley* v. *United States*, 237 F. 2d 327, 333 (C.A. 9), certiorari denied, 352 U.S. 873.

*b.* Petitioner has apparently confused the court's instructions on this question with its instructions on the other charges upon which he was also tried—*i.e.*, that he failed to report for induction on November 8, 1955 (the first indictment) and on or about April 9, 1956 (the first count of the second indictment) (R. 1–3). In its instructions on those counts there was reference to the nature of the proof that the induction

notices of September and October 1955 had been mailed by the local board. And it was to these counts that the court addressed itself when discussing the presumptions of receipt. But the jury did not reach a verdict on these charges, and we do not understand how such instructions can now be subject to challenge, or how they affected the clear instructions on the count on which petitioner was convicted.[24]

*c.* If petitioner means to argue that the government was required by *direct* evidence to show that "the card was actually not mailed" (Pet. Br. 37), he is seeking to impose an impossible burden of proof on the government and to engraft a novel rule in the trial of a criminal case. The government had no way of proving by direct evidence that petitioner did not mail the post card. This was information which only petitioner and his witnesses could provide. See *United States* v. *Fleischman*, 339 U.S. 349, 360–362; *Morrison* v. *California*, 291 U.S. 82, 88–91; *Rossi* v. *United States*, 289

[24] It might be noted that, in the instructions directed to the other counts, the court did not rely upon "the mere presumption that the board employees performed their duties", as petitioner says (Pet. Br. 36). The court said (R. 175–176): "* * * To establish mailing of a letter containing notice, in the absence of direct evidence, there must be proof of an invariable custom or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle, and in addition there must be testimony by the employee whose duty it was to deposit the mail in the Post Office that he or she actually deposited that letter in the Post Office or that it was the invariable custom to deposit every letter placed in the office receptacle in the United States Post Office or Mail Box."

Of course, as we have noted, the propriety of these instructions is not in issue here since the jury was unable to agree on a verdict as to the counts to which they were directed.

U.S. 89, 91; *Bell* v. *United States,* 185 F. 2d 302, 309 (C.A. 4), certiorari denied, 340 U.S. 930; *Dillon* v. *United States,* 218 F. 2d 97, 99–100 (C.A. 8), certiorari dismissed, 350 U.S. 906; *Williams* v. *United States,* 170 F. 2d 319, 322 (C.A. 5), certiorari denied, 335 U.S. 909. The only evidence the government had or could submit as part of its case was testimony that no such post card was received at the local board (see the Statement, *supra,* pp. 7–8). And while this evidence did not and could not exclude the possibility that the card had somehow gone astray through no fault of the accused, it certainly was sufficient to shift the burden of going forward to petitioner to adduce testimony as to mailing, which he alone could provide. It was this latter testimony which the jury was directed by the court to assess and evaluate. And it was this testimony that it could and did reject—thus finding that the post card was never mailed.

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In sum, on sufficient evidence, under proper instructions, the jury found petitioner guilty as charged. The probative sufficiency of the evidence has the support of both the trial court and the court below, and there is no showing of error in this appraisal. In the circumstances, there is no reason to disturb the jury's findings. *Delaney* v. *United States,* 263 U.S. 586, 589–590; *United States* v. *Johnson,* 319 U.S. 503, 518.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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